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Parks v. Safeco Insurance Co. of Illinois Appellant's Reply Brief Dckt. 43376

IN THE IDAHO SUPREME COURT

DAVID & KRISTINA PARKS, *Plaintiffs-Appellants,* vs. SAFECO INSURANCE COMPANY OF ILLINOIS, *Defendant-Respondent.*	)	**Idaho Supreme Court** **Case No: 43376**

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Appeal from the Sixth Judicial District Court
Bannock County Case No. CV-2013-2253-OC
The Honorable Stephen S. Dunn, Presiding

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SYNOPSIS OF REPLY ARGUMENT

The Park's "Safeco New Quality-Plus" policy homeowners policy with Safeco entitled them to the "Direct financial loss you incur" and to be paid "shortly following the loss" when their Pocatello home was totally destroyed by the Pocatello "Charlotte Fire" on June 28, 2012. **CR 266.** The value of their total loss was ultimately undisputed by Safeco: The Parks' 4858.28 square foot two-level custom home would cost $440,195.55 to replace. **CR 428-429; David Parks Depo. Ex. 21, pp. 25-26.** But Safeco paid them $169,000 stating they had to buy or build another home — and spend *their own* money *first* — before Safeco would pay anything more.

On May 31, 2013 the Parks made formal demand for their "Direct financial loss" — $440,195.55— pursuant to the "direct financial loss" payment provisions of paragraph 5(a)(4)(b) of their policy. That paragraph entitled the Parks to their "direct financial loss" subject only to the limits of coverage. **CR 444-445; David Parks Depo. Ex. 27.** The $440,195.55 loss amount was the replacement *direct* cost determined by Safeco's own expert, Belfor Property Restoration in Boise. In deposition *without qualification,* Safeco admitted "agreement" with *all* of "the numbers and computations" contained in that Belfor determination. **CR 564; Safeco Depo. 89:17-22.**

The District Court granted summary judgment to Safeco, ruling — as Safeco urged — the Parks had to *fund their own loss first* before Safeco had to pay anything. In so ruling, the District Court totally ignored both the "direct financial loss" and "*shortly following* the loss" Safeco policy language. Safeco's only response on appeal is that the Parks never made those arguments below so can not be raised on appeal.

This Reply Brief shows those issues were raised, briefed, and argued.

STANDARD OF REVIEW UNDISPUTED

Safeco's brief does not cite any new law or create any conflict of law between the parties. The applicable general principles of law are not in dispute. Specifically, there is no dispute that on appeal from the grant of a motion for summary judgment, the Supreme Court reviews that decision *de novo* while applying the same Rule 56 standards. ***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662, 115 P.3d 751, 753 (2005).**

Nor does Safeco dispute that Insurance contracts must be construed "according to *the entirety* of its terms" and "the *context*" in which the terms occur.[1] Idaho Code §41-1822; ***Purdy v. Farmers Ins. Co. of Idaho* 138 Idaho 443, 444, 65 P.3d 184, 185 (2003).** Similarly, it is agreed that "common, non-technical words" are given the "meaning applied by laymen in daily usage" as opposed to legal usage; and the Court construes insurance contracts in the light *most favorable to the insured* and *in a manner which will provide full coverage* for the indicated risks rather than to narrow its protection." ***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662-663, 115 P.3d 751 (2005); *Weinstein v. Prudential* Ins., 149 Idaho 299, 320, 233 P.3d 1221, 1242 (2010).**

The proper application of those principles would have avoided this appeal.

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[1] All *italics* and **bold** herein are added for emphasis unless stated otherwise.

REPLY ARGUMENT

REPLY POINT ONE

THE PARKS ENTITLEMENT TO THEIR "DIRECT FINANCIAL LOSS" WAS THEIR POSITION FROM THE OUTSET AND WAS DIRECTLY PRESENTED TO THE DISTRICT COURT; THERE WAS NO WAIVER

Two "Loss Settlement" Payment Options

The Parks' opening brief pointed out that under the Parks' Safeco policy there were two "Loss Settlement" routes for the Parks and that they sought payment of their "direct financial loss" under the second of those two routes. **Plaintiffs' opening brief, Point One, pp. 19-23.**

The District Court totally ignored "direct financial loss"

In granting summary judgment for Safeco, the District Court *totally ignored* that "direct financial loss" second route under the policy — the words "direct financial loss" appear nowhere in the Court's Memorandum Decision.[2] **CR 1054-1072.**

That failing was fundamental, reversible error. It was *mandatory* for the District Court to decide the case "according to *the entirety* of " the Safeco policy terms"

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[2] It is undisputed on this appeal that Safeco's adjuster never advised the Parks nor acknowledged their right to recover their "direct financial loss" or to be paid "shortly after the loss". To the contrary, it is admitted on appeal that Safeco would pay the Parks *only* "when the Parks incurred the cost" — paid their own loss — of a new home as the Parks *only* options were "replacing the dwelling at its existing location, build on a new location, or purchase an existing home." **Safeco brief, pp. 7, 18, 20.**

and "the *context*" in which the terms occur. ***Idaho Code* §41-1822; *Purdy v. Farmers Ins. Co. of Idaho* 138 Idaho 443, 444, 65 P.3d 184, 185 (2003).**

This is what that "Direct financial loss" recovery route looks like as it appears in the Parks' Safeco homeowner's policy:

> (4) You may disregard the ***replacement cost*** loss settlement provisions and make claim under this policy for loss or damage to buildings on an ***actual cash value*** basis but not exceeding the smallest of the following amounts:
>
> (a) the applicable limit of liability;
>
> (b) the direct financial loss you incur; or
>
> (c) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.
>
> You may still make claim on a ***replacement cost*** basis by notifying us of your intent to do so within 180 days after the date of loss.

Safeco's non-substantive response: "issue not raised below"

Safeco's brief herein does not substantively challenge the Parks' contract rights to pursue that "second route" for recovery of their "direct financial loss." Rather, Safeco seeks to avoid dealing substantively with that mandatory issue by contending — incorrectly — that the Parks "waived their argument concerning direct financial loss" because "this was *not* an issue raised below."[3] **Safeco's brief, Point One, p. 13.**

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[3] Safeco, thus, essentially admits that the District Court committed reversible error in not deciding this case on the basis of *all* the policy provisions, and especially those that entitled the Parks to their "Direct financial loss" and to be paid "shortly following the loss." Safeco suggests this Court should nevertheless "uphold the lower court's decision if any alternative legal basis can be found to support it." **Safeco Brief, p. 13.** Safeco does not state what such an "alternative legal basis" would be — other than the false contention dealt with herein that those two issue were not raised below.

False argument — The Right was Centrally and Repeatedly raised below

Not true. The right of the Parks to recover their "direct financial loss" was a *repeated* formal demand on Safeco, was (a) centrally in the Parks' *Complaint and Jury Demand,* (b) in the Parks' summary judgment filings, at the very forefront of the first summary judgment oral argument on May 27, 2014, and (c) was *specifically* acknowledged by the District Court and Safeco defense counsel in that May 27, 2013 first oral argument. Further, it was (d) acknowledged in the final oral argument as a claim under policy paragraph 5(a)(4) as "*exactly what occurred* in this case." **Tr. 80:18-81-4 (2-23-15); CR 444-445, 459-485, Ex. 27, 35.**

Pre-suit "Direct financial loss" Formal Demand on Safeco

But even before any legal proceedings, the Parks' right to recover their "direct financial loss" was directed to Safeco by "formal demand" on Safeco on December 26, 2012. This is shown by the record on appeal and was specifically set forth in the Parks' opening brief herein. **Plaintiffs' opening brief, p. 23; CR 444-445; David Parks Depo. Ex. 27; Tr. 21:22-22:4; Tr. 23:8-9; 24:2-12; Tr. 24:23-24; Tr. 44:5-6, 11 (5-27-14).**

> This letter is **formal demand for payment** to the Parks...
> * * *
> Because the Parks are, for purposes of this demand, willing to agree with the Belfor Property Restoration determination of **their "direct financial loss"** the issue is determined between Safeco and the Parks and the further "Appraisal" provisions of paragraph 7 under Section I do not trigger.
> * * *

> Specifically, this demand is pursuant to your offered July 31st letter provisions referenced above *and* paragraphs 5(a)(1) and **5(a)(4) of Section I requiring payment of "the direct financial loss"** the Parks have incurred. Payment is due.
> **— CR 444-445**

* * *

"Direct financial loss" demand in *Complaint and Jury Demand*

Further demand under the "direct financial loss" provisions of paragraph 5(a)(4) was repeated in the Parks' letter to Safeco dated May 31, 2013[4] and was central to the Parks' ***Complaint and Jury Demand*, p. 3, ¶14; CR 15.**

> 14. Subject to the Parks' right to determine otherwise, the $440,195.55 determination by Belfor Property Restoration constituted **the "Direct financial loss" of the Parks** of their totally-destroyed residence.
> **— CR 15; *Complaint and Jury Demand*, ¶ 14**

"Direct financial loss" in Answer to Safeco's Discovery

Following the initial May 31, 2013 "formal demand" for payment to the Parks of their "direct financial loss" suit was filed and Safeco sent discovery to the Parks'. The Parks policy right to recover their "direct financial loss" was also *three times* spelled-out in their discovery responses:

- Answer to Safeco's Interrogatory No. 6 on November 22, 2013, **Ex. 40**

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[4] The right of the Parks to recover "direct financial loss" was repeated in a letter to Safeco on January 23, 2013 referencing the Parks' direct financial loss as their "actual loss":

> The Parks will bring to me tomorrow the Idaho Falls home sale documents. Copies will be sent with the understanding that they are tendered solely to confirm the move referenced in my prior letter; their **"actual loss" remains the $440,195.55 gross sum** as determined by Safeco's retained expert, Belfor Property Restoration of Boise, Idaho acknowledged in your November 24th letter as having "been approved" by Safeco.
> **— CR 449, David Parks Depo, Ex. 30**

to David Parks' Deposition, CR 496.

- Answer to Safeco's Request for Admission No. 21 on September 3, 2013, and

- Answer to Safeco's Request for Admission No. 40 on October 22, 2013.[5]

"Direct financial loss" in Summary Judgment Oral Argument

Consistently, on May 27, 2014 the Parks right to recover their "direct financial loss" was argued and literally *pointed out* by "an arrow" pointing to paragraph 5(a)(4)(b) on page 12 of the policy, (**CR 284, POL 28**). This took place *initially* in the first few minutes of oral argument[6] and was followed by multiple references from both counsel and the Court. **Tr. 21:22-22:4.**

The District Court Acknowledges "Direct Financial Loss" Right

Specifically, the right of the Parks to recover their "direct financial loss" was argued and pointed out an additional two times to the District Court in that first hearing. **Tr. 23:8-9; 24:2-12.** The District Court *specifically acknowledged* the "direct financial loss" focused position of the Parks and referenced paragraph 4(b) of the policy where that recovery right is contained:

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[5] The key pages of the Parks' Answers to Safeco's Requests for Admission nos. 21 and 40 are attached at the end of this Reply Brief.

[6] MR. HAWKES: And they never requested it.
THE COURT: Okay.
MR. HAWKES: So now in last page is where we are here. And **I've got an arrow at the bottom part** that basically [points] to where these two were merged together, it boils down to you can go after the applicable limit of liability **or the direct financial loss** or a prorata share of the policies.
THE COURT: Right. **Tr. 21:22-22:5 (5-27-14)**

> THE COURT: Well, it's listed under 4(b), the **direct financial loss** you incurred. — **Tr. 24:23-24 (5-27-14)**

Safeco Counsel acknowledges "direct financial loss" right

Following the foregoing referenced recognition by the District Court of paragraph 5(a)(4)(b), Safeco counsel[7] *twice* acknowledged "direct financial loss" as the argument made. **Tr. 44:5-6, 11 (5-27-14).**

"Direct financial loss" — Admitted to be what the Parks *incurred*

Further, Safeco counsel admitted in oral argument that the Parks' "direct financial loss" was not the same as the purchase of another house in Idaho Falls but was what they actually *incurred*:

> THE COURT: Are you saying that that paragraph is the paragraph that applies if they go out and buy another house in Idaho Falls? And if that's less than the *direct financial loss* even if Mr. Hawkes is correct, the detect **[direct] financial loss is the amount this they've, quote, unquote, *incurred*.** Is that your position?
> MR. SEBASTIAN: Your Honor, **yes**.
> — **Tr. 44:17-21 (5-27-13)**

"Direct financial loss" Demand Admitted to be "Exactly what occurred"

The Parks seeking payment of their "Direct financial loss" under paragraph 5(a)(4) of the Safeco policy that was originally formalized in the May 31, 2013 demand on Safeco was admitted by Safeco counsel in the second and final summary judgment

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[7] The same counsel for Safeco argued at the two summary judgment hearings as authored Safeco's brief on this appeal. That is why it is curious to now contend "direct financial loss" sought by the Parks "was was *not* an issue raised below." **Safeco's brief, Point One, p. 13.**

oral argument as "*exactly* what occurred in this case." **Tr. 81:3-4 (2-23-15).**[8]

Summary Judgment Filings

It was perfectly to be expected that the Parks' right to recover their "Direct financial loss" would be centrally presented below given the issue being a central demand on Safeco, being focused in discovery, and a part of the Parks' summary judgment filings. It was centrally set forth in the Parks summary judgment filing of the *Declaration of Charles M. Miller*, paragraphs 16 and 17. **CR 944, ¶¶ 16, 17.**

* * *

No Waiver of the Right to Recover "Direct Financial Loss"

Because the issue of "Direct financial loss" was *thoroughly* raised with Safeco pre-suit and in the totality of the District Court legal proceedings, there was no waiver of the Parks; "Direct financial loss" recovery right as Safeco groundlessly argues. **Safeco's brief, Point One, p. 13.**

Otherwise, the principles of a waiver are well known: Waiver is "the relinquishment of a known right" that can only follow a"clear intent to waive" that *cannot be inferred* — and that absolutely did *not occur* herein. ***Pocatello Hospital, LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho 709, 330 P.3d 1067 (2014) (citing *Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 603 (2011); *Margaret***

[8] That admission of Safeco counsel in that last of two final summary judgment oral arguments on February 23, 2015 shows a continuous thread of multiple references and argument of the Parks "Direct financial loss" rights under paragraph 5(a)(4)(b) of the Safeco policy. Prior references follow.

***H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993) and others).** Silence is insufficient to establish waiver of a right. ***Fullerton v. Griswold*, 142 Idaho 20, 824, 136 P.3d 291, 295 (2006).**

Further, for Safeco herein, to assert waiver it must also (1) "show that he [Safeco] acted in reasonable reliance upon [the waiver] and" that (2) Safeco "altered" its "position" to its "detriment." ***Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 603 (2011).** None of that happened; Safeco does not argue in its brief that it ever *relied* upon any *waiver* by the Parks of their clear assertion of the right to recover their "direct financial loss." It could not have; that never happened.

REPLY POINT TWO

THE COURT ERRED IN TOTALLY DISREGARDING THE POLICY *CONTEXT* OF THE WORDS "AS DETERMINED SHORTLY FOLLOWING THE LOSS"

The Parks opening brief pointed out that it was the duty of the District Court to consider *all* of the insurance policy language without discarding any words in the context of the policy. **Parks opening brief, Point Four; *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997); *Purdy v. Farmers Ins. Co. of Idaho* 138 Idaho 443, 444, 65 P.3d 184,185 (2003); *Weinstein v. Prudential Property and Casualty Insurance*, 149 Idaho 299, 315, , 233 P.3d 1221, 1237 (2010).**

Specifically, Point Four explained that while it was reversible error to *totally ignore* the Parks' right to recover their "Direct financial loss" under the second

route the Safeco policy provided, it committed reversible error in also *totally ignoring* the words "as determined *shortly following* the loss" in holding that the Parks had to borrow money to pay their own loss before Safeco had any payment obligation. **Parks opening brief, Point Four, pp. 38-41.**

"Not raised below" — *Really??*

Safeco's only response to Point Four and the District Court's *totally ignoring* the policy payment language of "as determined shortly following the Loss" was — *again* — "not raised below and has been waived." **Safeco brief, Point E, p. 19.** Rerun. That is, *again*, a misrepresentation to this Court just as it was as explained in the foregoing Reply Point One dealing with the right to be paid the "Direct financial loss."

The importance of the language "as determined shortly following the Loss" explains the *essence* of "replacement cost" to insureds who buy a Safeco homeowners policy like the Parks had. Payment of a casualty loss "shortly following the Loss" is the very essence of why people buy insurance; Insureds expect *insurance*, not a brick wall of assertions that they have to *first* borrow money to pay their own loss before Safeco honors its obligations in selling the insurance.

This is the "first route" exclusive payment language in the Safeco policy as it appears in the policy that the District Court considered in deciding against the Parks:

Fully addressed in Oral argument

Contrary to Safeco's brief's representations to this Court, the "shortly

> **5. Loss Settlement.** Covered property losses are settled as follows:
>
> a. **Replacement Cost.** Property under Coverage A or B at ***replacement cost,*** not including those items listed in **5.b.(2)** and **(3)** below subject to the following:
>
> (1) We will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts:
>
> (a) the limit of liability under the policy applying to Coverage A or B;
>
> (b) the ***replacement cost*** of that part of the damaged building for equivalent construction and use on the same premises as determined shortly following the loss;
>
> (c) the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss;
>
> (d) the direct financial loss you incur; or
>
> (e) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.
>
> (2) When more than one layer of siding or roofing exists for **Building Property We Cover,** we will pay for the replacement of one layer only. The layer to be replaced will be at your option. The payment will be subject to all other policy conditions relating to loss payment.
>
> When more than one layer of finished flooring exists we will pay for the finish of only one layer.
>
> (3) If the cost to repair or replace is $1,000 or more, we will pay the difference between ***actual cash value*** and ***replacement cost*** only when the damaged or destroyed property is repaired or replaced.

following the loss" argument was specifically made and briefed to the District Court while pointing out the law that in interpreting an insurance policy "*you don't throw away words*":[9]

> MR. HAWKES: The definition doesn't say anything about any of the arguments that SAFECO can make. They're [the

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[9] The necessity of including the words "as determined shortly following the loss" in a correct and reasonable application of the word "incurred" with reference to the replacement cost and loss incurred was specifically raised below in *Plaintiffs' Memo Opposing Defendant's Motion for Summary Judgment and Supporting Summary Judgment for Plaintiffs* as Points One and Three. **CR 929, 933-934.** It was also covered in the *Declaration of Charles M. Miller in Support of Plaintiffs*. **CR 943, ¶ 14.**

> Parks] entitled to the full amount...— *as determined shortly following the loss.* **Tr. 85:22-25 (2-23-15)**
>
> * * *
>
> THE COURT: ...your argument is actually and necessarily means if the house burns out [down], ***you have an actual loss***. And as a result — ***it's been incurred***, so you get to pay it.
>
> — **Tr. 86:4-6 (2-23-15)**
>
> * * *
>
> MR. HAWKES: Yes. And if you buy a replacement cost policy as opposed to an indemnity policy, like their policy manual talks about, you've got to look at this whole thing under the heading of replacement costs. And *you don't throw away words*. And when you have the words in there ***as determined shortly following the loss***, it only makes sense that you determine what it was that they lost by their replacement cost definition, and you pay it. You don't wait.
>
> — **Tr. 87:6-14 (2-23-15)**

The District Court erred in (1) concluding that the cheaper Idaho Falls home the Parks had to borrow money to purchase was "the equivalent of" the home the Parks lost, and (2) in ruling that the words "incur" or "incurred" could only have a single meaning of incurring indebtedness. The Parks had no policy obligation to borrow money and buy another home before being paid for "the loss you incur" — and "as determined shortly following the loss" as the policy required.

Had the District Court properly applied the law and the facts the "direct financial loss" of the Parks would have been the same result and recover under either this first available route or the primary paragraph 5(a)(4)(b) initial demand on Safeco.

REPLY POINT THREE

BECAUSE THE PARKS' FULL HOME REPLACEMENT COST LOSS WAS KNOWN BY THE BELFOR DETERMINATION, *WEINSTEIN* REQUIRED SAFECO TO PAY THE PARKS "AS *DETERMINED SHORTLY* FOLLOWING THE LOSS"

Both the Parks and Safeco cite to *Weinstein v. Prudential Property and Casualty Insurance*, 149 Idaho 299, 233 P.3d 1221 (2010) in their briefs. The Parks for the rule of law that an insurance policy must be interpreted according to the *entirety* of "the context in which it occurs" that the District Court did *not* do. [10] Safeco cites *Weinstein* for the rule of law that,

> where an insurer was able to determine a portion of an insured's damages that were justly due under the Policy, the insurer was obligated to make payment even if the claim was not fully adjusted.
> **— Safeco's Brief, page 22.**

In the District Court, the Parks were essentially precluded from challenging the Jones appraisal as what they were entitled to. That was wrong and it is a double standard for Safeco on this appeal to hold out that Jones appraisal as an act of good faith under *Weinstein* while precluding the Parks from a factual challenge to that appraisal.

An Insurer's "Assumed Duty" must not be Negligent

To the extent that Safeco *now* relies on *Weinstein* as establishing a duty Safeco did not otherwise have, the doctrine of "assumed duty" comes into play. In

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[10] Plaintiffs opening brief, pages 18, 40-41.

Featherston v. Allstate Insurance Co., 125 Idaho 840, 875 P.2d 937 (1994) this Court reversed a summary judgment in favor of the insurer for liability in negligently undertaking an assumed duty:

> An insurance policy is a contract and the parties' rights and remedies are primarily established within the four corners of the policy. *State v. Continental Casualty Co.,* 121 Idaho 938, 939-40, 829 P.2d 528, 529-30 (1992); *Kootenai County v. Western Casualty & Surety Co.,*113 Idaho 908, 910, 750 P.2d 87, 89 (1988). * * *This court has recognized a "special relationship between insurer and insured which requires that the parties deal with each other fairly, honestly, and in good faith" and acknowledges the disparity in bargaining power between the insurer and insured. *White v. Unigard,* 112 Idaho 94, 99, 730 P.2d 1014, 1019 (1986), quoting McCarthay, *Punitive Damages in Bad Faith Cases* 3d 23 (1983). **In addition, it is possible to create a duty where one previously did not exist. If one, voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.** *Bowling v. Jack B. Parson Cos.,* 117 Idaho 1030, 1032, 793 P,2d 703, 705 (1990)."
>
> **— *Featherston v. Allstate Insurance Co.*, 125 Idaho 840, 843, 875 P.2d 937, 941 (1994)**

Where Safeco's adjuster admitted the Jones appraisal did *not* conform to what she had specifically requested and that it was thus deficient, it was error for Safeco in summary judgment to argue that the Parks were bound by that defective appraisal. And it was reversible error for the District Court to deprive the Parks of their right to challenge that appraisal where it was held out as the only way they could prove their "direct financial loss."

Parallels with *Weinstein*

This case has strong direct parallels to *Weinstein.* In both cases the value of the insured losses were known. In both cases payment was refused and delayed for reasons *not* required by the policy. In can be shown in a table this way:

Weinstein Facts	*Parks* Facts
Plaintiff's medical bills were known. **149 Idaho at 319, 233 P.3d at 1241**	The Parks home replacement cost was known by the Belfor Property Restoration evaluation. **CR 691-708; Belfor Appraisal**
Liberty Mutual refused to pay those known and undisputed medical bills — "he knew Liberty Mutual owed the Weinsteins" under the policy. **149 Idaho at 319, 233 P.3d at 1241**	Safeco refused to pay the home replacement cost though it admitted every single element of the replacement cost of the Parks home as set forth by Belfor. **CR 564, 705; Safeco Depo. 89:17-22, Ex. 8**
Liberty Mutual had liability for delaying/withholding payment until the whole claim was adjusted when such was not a policy condition. **149 Idaho at 314, 319, 233 P.3d at 1236, 1241**	Safeco refused/delayed payment to the Parks of the undisputed replacement cost of their destroyed home as their undisputed "direct financial loss" by requiring them to borrow money to buy another home — not a policy condition under paragraph 5(a)(4)(b) of the policy.

REPLY POINT FOUR

THE $255,000 IDAHO FALLS HOME WAS NOT "THE EQUIVALENT OF" THE PARKS TOTALLY DESTROYED HOME THAT WOULD TAKE $440,195.55 TO "REPLACE"

The Parks opening brief pointed out that it was error for the District Court to recognize and cite several definitions of "replacement" that recognized the meaning to be "the equivalent of" only to totally disregard that "equivalent of" definition language in holding that the smaller Idaho Falls house the Parks purchased was the "replacement" of their much larger home. **Parks opening brief, Point Two, pp. 24-28.**

Safeco's brief does *not* address that "equivalent of" Point Two other than to say "The Idaho Falls home *replaced* the Pocatello structure." **Safeco brief, p. 17.** That misses and avoids the point; one thing can "replace" another and *not* be "the equivalent" of what it replaced.

It was error by the District Court to disregard that "equivalent of" definitional language because insurance contracts, as contracts of adhesion, must be read in a light *most favorable to the insured* and ***in a manner which will provide full coverage*** for the indicated risks rather than to narrow its protection." ***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662-663, 115 P.3d 751 (2005)**.

The District Court started the process properly when it focused on the definitions of "replace" as found in Webster's Dictionary:

1. To place again; *to restore* to a former place, position, condition, *or the like*.
2. *To refund*; to repay; *to restore*.
3. To supply or *substitute an equivalent for*.
4. To take the place of; to supply the want of.
5. To put in a new or different place.

— **CR 1063; Memorandum Decision, p. 10 (4-23-15)**

Six times reference to the "Equivalent" of what the Parks Lost

On the next half a page of his *Memorandum Decision*, the District Court referred *five times* to the Parks being entitled to "an equivalent for" what they lost, while stating that the five enumerated definitions by Webster's of "replace" were "*not* in conflict with one another." **CR 1064; Memorandum Decision, p. 11 (4-23-15).** The Court then, for the *sixth* time, stated that the Parks were entitled to the "equivalent" of what they lost:

> Within the context of the Replacement Cost provision, all interpretations of "replace" as used in the Policy plainly provide that Defendant has three options to "supply or substitute *an equivalent for*" Plaintiffs' destroyed home.
>
> — **CR 1064; Memorandum Decision, p. 11 (4-23-15)**

The District Court then essentially ignored the very definitional "equivalent of" process it had gone through stating that the $255,000 the Parks paid for the Idaho Falls home was "the amount actually incurred to repair or *replace*" the Parks' Pocatello home. **CR 1066; Memorandum Decision, p. 13 (4-23-15).**

The District Court: "a like-kind analysis"

That failure of the District Court to apply the "equivalent of" definition is further significant because in oral argument the District Court acknowledged that what

the Parks were entitled to was "a like-kind analysis" for their home, not a smaller, cheaper home. **Tr. 24:1 (5-27-14).**

"As-close-as-possible *replica* of your home"

That acknowledged "like-kind" and "equivalent for" valuation of the Parks loss is also the same "label"[11] Safeco put on the Parks policy. The policy spoke of providing coverage so that "in the event of a loss" they would be insured for "as-close-as-possible-replica" of their home — not a smaller one they had to buy because Safeco, post-loss would first require them to borrow to get another smaller home. **CR 627, POL 49**

A Smaller, less expensive home is *not* the "Equivalent"

While it is true that the cheaper Idaho Falls home "took the place of" where the Parks now slept at night — just as a hotel room or a cheap apartment would have — it certainly was *not* the "equivalent for" or "the like-kind" of the Pocatello home the Parks lost in the fire. Nor did the cheaper Idaho Falls house purchase "restore to" the Parks the "equivalent of" the larger, more expensive Pocatello home for which they had paid their decades of premiums to Safeco.

The District Court erred in not applying the clear law that construes insurance contracts in a light *most favorable to the insured* and ***in a manner which will provide full coverage*** for the indicated risks *rather than* to narrow its protection."

***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662-663, 115**

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[11] This page of the Safeco policy is titled **Let's make sure you're "fully insured." CR 627, POL 49**

P.3d 751 (2005). The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage; exclusions or provisions not stated with specificity will not be presumed or inferred. ***Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003).**

The District Court failed to follow the law in only looking at one portion of the Safeco policy and requiring the Parks to first "pay their own loss" before receiving any insurance payment. That was reversible error.

REPLY POINT FIVE

IT WAS ERROR TO FAIL TO APPLY A DEFINITION OF "INCUR" THAT WAS MORE REASONABLE AND MORE FAVORABLE TO THE INSUREDS

The Parks' opening brief explained that it was error for the District Court to apply a definition of the word "incur" to *only* mean *incurring a debt* — to first "pay their own loss" — in connection with the Parks eventual purchase of the smaller, cheaper home in Idaho Falls. **Parks' opening brief, "Point Three," pp. 28-38.**

The Parks' opening brief pointed out that the word "incur" also had the meaning of "incurring a loss" — it was in the focal paragraph 5(a)(4)(b) policy language of the "direct financial *loss* you *incur*" which the District Court specifically acknowledged:

> **The Court:** Well, it's listed under 4(b), the direct financial[12] *loss you incurred.*
> **— Hearing Transcript 24:23-24 (5-27-14); Parks' opening brief, p. 31**

In contrast to the District Court's position that "incur" could *only* refer to incurring a *debt,* the Parks opening brief pointed out that incurring a *loss* was also an equally-applicable usage as in:

- The Safeco policy paragraphs 5(a)(1)(d) and 5(a)(4)(b) — "the direct financial *loss* you *incur*." **CR 284, POL 28**

- Mr. Parks' layman's understanding that the word "incurred" to him meant that "it occurs."[13] **CR 225; David Parks Depo 83:13-15.**

- This Court's judicial recognition that a *loss* may even be "incurred" *before* it is even manifest because the casualty event has already taken place. **CR 950, ¶ 27; *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 455-56, 111 P.3d 135, 140-41 (2005)**

- Pursuant to "insurance industry standards" the word "incur" should be read to include casualty *losses* for which damage determinations have been made and not just a subsequent debt as the District Court so limited usage. **— CR 943; *Charles M. Miller Declaration*, ¶14**

- Other Idaho law logically recognizing the common use of the words "incur" or "incurred" to describe *casualty and injury events*, such as where persons "*incurred* physical impairment" or "might *incur*" from another's negligence, or "for any *injury* that one may ***incur***" in voluntary employment. **— Parks opening brief, "Point Three," pp. 36-37; *Nitkey v. Bunker Hill & Sullivan Min. & Concentrating Co.*, 73 Idaho 294, 296, 251 P.2d 216, 217 (1952)**; ***Morrison v. Northwest Nazarene University*, 152**

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[12] This portion from the transcript of the May 27, 2014 summary judgment oral argument was quoted at length in the Parks' opening brief on this appeal. Yet Safeco's brief nevertheless argued to this court that the Parks' "direct financial loss" was "*not* an issue raised below." **Safeco brief, page 13.**

[13] Mr. Parks was right. Both "incur" and "occur" have the same Latin root and are synonyms. Oxford English Dictionary, www.oed.com/view/Entry/94140 cf www.oed.com/view/Entry/130192.

Idaho 660, 661, 273 P.3d 1253, 1254 (2012); Idaho Attorney General Opinion 78-17 (3-28-78), 1978 WL 22946

The District Court, even in looking to the 2014 *Black's Law Dictionary* definition of "incur" overlooked the two-part definition that included an involuntary event — "to suffer ***OR***" the contrasting and *voluntary* "bring on oneself (a liability or expense)" while stating the "term *incur* is not subject to conflicting interpretations."[14] **CR 1065; Memorandum Decision, p. 12 (4-23-15).**

Again, Safeco's brief does not even *substantively* address of the Parks' opening brief "Point Three" or the District Court's one-sided definitional use of the words "incur" or "incurred." Rather, it states a terse 14-line response to "Point Three" by the conclusion that the Parks "had a choice to rebuild the Autumn Lane home or purchase a replace[sic] property. They chose the latter." **Safeco brief, p. 18.**

That is *not* a *substantive* response; it is a parroting of Safeco's false information to the Parks that such was their *only* option under the policy that gave them the right to recover their "direct financial loss" and to do so "shortly following the loss." **CR 284, POL 28, ¶¶ 5(a)(4)(b) and 5(a)(1)(b).**

At a minimum, the word "incur" has both a *voluntary* and an *involuntary*

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[14] It was not necessary to brand the issue as one of "conflicting interpretations" as the words "incur" or "incurred" can apply to both an involuntary *casualty loss* like occurred her as well as a voluntary *debt incurred* that people do for a variety of reasons. A loss *incurred* would certainly be the more common usage where the purchase of casualty insurance is involved.

meaning and whether treated as the proper application to the circumstances, an ambiguity, or the application of a definition favorable to the Parks and one unfavorable, the usage favorable to the Parks must be used. ***Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242 (2003).** The District Court erred in not so doing.

REPLY POINT SIX

THE PARKS WERE NOT REQUIRED TO HIRE ANOTHER APPRAISER TO COUNTER THE LOWBALL JONES APPRAISAL

The Parks' opening brief set forth the detail behind the "Lowball" Jones appraisal of the Parks' destroyed home: it was "*less than half*" what Safeco had advised the Parks six weeks earlier it should be insured for (**CR 399-400**; **David Parks Depo. Ex. 20, p. 2, Check No. 8004530 (7-26-12)**, only valuing 1,943 square feet — less than half of the home's actual 4,858.28 total square footage. **CR 705; Safeco Depo. Ex. 8, p. 25 "Grand Total Areas"; CR 554-555; Safeco Depo. 49:23-50:3**; used two-year old 2010 "comparables" rather than 2012 values and took those "comparables" from three of six other "tract" houses rather than the more exclusive area of Autumn Lane where the Parks lived. **CR 673; Safeco Depo. Ex. 7.**

Admission by Safeco: Jones Appraisal Deficient

Safeco admitted that was wrong; Mrs. Abendschein testified she had asked Mr. Jones to give Safeco "*current* 2012 values" of the Parks' home "the day before the fire" and *not* 2010 values that Jones used. But Safeco was *silently* content with receiving

that insurer-highly-favorable appraisal. **CR 563; Safeco Depo 85:13-19; CR 563; Safeco Depo. 85:13-19; Parks opening brief, pp. 10-11.**

Thus, that lowball-defective-negligent Jones appraisal was indefensible before the District Court as it failed to meet the non-negligent standard of good faith and fair dealing with the Parks. Safeco's fiduciary duty[15] to the Parks certainly included not hiding the truth from them and misleading them as to their policy payment rights.

Collateral Attack on Indefensible Jones Appraisal

Because the Jones appraisal is substantively *not* defensible, Safeco's brief takes a collateral attack *on the Parks*, arguing the Parks had a duty to get their own counter appraisal or be stuck with that Jones deficient appraisal. **Safeco brief, pp. 4, 17** (The Parks "never obtained a different estimate" and thus had no "grounds to argue with the appraisal"; the Parks "failed to provide expert evidence from an appraiser showing that Mr. Jones' valuation of the ACV was incorrect.").

No Second-Appraisal *written Demand* by Safeco

But there was *zero* obligation on the Parks to seek a separate, second appraisal. A second counter-appraisal comes into play only "on the *written demand* of either" which Safeco *never*[16] made. This is that contract clause:

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[15] "The insured-insurer relationship is one characterized by elements of public interest, adhesion and *fiduciary responsibility*." ***White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 99, 730 P.2d 1014 (1986)**

[16] It is a common feature of an insurance policy for a procedure or process to be *optional* as between the Insureds and the Insurer. For example, in the Parks' Safeco Policy there is a section titled "3. An Insured's Duties After Loss." Subparagraph "g" of that paragraph 3 provides that a "signed

> 7. **Appraisal.** If you and we do not agree on the amount of the loss, including the amount of *actual cash value* or *replacement cost*, then, ***on the written demand of either***,... **— CR 284, 330; Safeco policy, page 12 at the bottom ("on the written demand of either" is added as bold and italics for emphasis).**

"Replacement Cost" is the Insured's Standard

Further, it is significant as to the Parks right to recover their "Direct financial loss" under their "Replacement Cost" policy that the "Insured's Duties After Loss" provisions of the Parks' Safeco policy focus *solely* upon "Replacement Cost." The Parks' obligation was to provide Safeco information "of the loss to the building and damaged personal property showing in detail the quantity, description, ***Replacement Cost***, and age; *not* a depreciated value.[17] **CR 616, Safeco policy, Section I "Property Conditions" ¶ 3(e), POL 27.**

No Proof Limitations

Thus, it cannot be disputed in good faith; the Safeco policy does *not* require the Parks to retain any appraiser to prove their loss. Nor is there anything in the policy that limits *how* the Parks can prove their "direct financial loss." The admitted-deficient

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sworn proof of loss" is *only* required "within 60 days ***after we request***" such. **CR 283, 329; POL 27.**

In the May 27, 2014 first summary judgment hearing it was pointed out to the District Court that Safeco had taken a position that the Parks "never provided a proof of claim" but that "the policy doesn't require [a] proof of claim...unless they [Safeco] request it ...And they never requested it." **Tr. 21:15-23; POL 27.** That makes practical sense as typically, like here, there is great detail in the Insurer's file from what the insured has furnished informally by phone, letter, visits with the onsite adjuster, public information from governmental agencies and such.

[17] "Replacement Cost" in the Safeco policy is defined as "the cost, at the time of loss, to repair or replace the damaged property with new materials of like kind and quality, without deduction for depreciation" — there is no reference to appraisal. **CR 623, POL 41; CR 942, Miller Declaration, ¶ 12**

Jones appraisal was assailable in the ways that "expert" testimony is always subject to challenge: (a) Internal errors, contradictions, and inconsistencies; (b) incorrect facts and computation elements; (c) failure to apply material components in final computations; and, among others, (d) Admission by the party/Safeco that the appraisal failed to follow directions and policy requirement. The Jones appraisal was subject to all these defects.

At a minimum, those admitted failings and defects created questions of fact that precluded the District Court from accepting it as "the final word" on the value of the Parks' home immediately prior to the fire loss.

It was reversible error for the District Court to deprive the Parks of their *factual* right of proving their "Direct financial loss"proof by the stipulated accurate Belfor Property Restoration determination and the Jones appraisal admitted defects and inaccuracies.

REPLY POINT SEVEN

THE JONES APPRAISAL WAS NOT COMPELLED BY "FEDERAL GUIDELINES"

Compounding the problems with the Jones appraisal was an inherent misrepresentation about that appraisal. In the District Court and before this Court Safeco attempts to justify the lowball Jones appraisal because it was the product of "federal guidelines" as stated in the *Declaration of Robert K. Jones*. **CR. 1015, ¶ 7 (2-9-15).**

Safeco's brief herein, promotes the even stronger [mis]representation to Mr. Parks that the Jones appraisal was "*strictly* regulated by federal guidelines."[18] **Safeco brief, p. 5.** Not so.

The Parks insuring agreement with Safeco was *not* a federal transaction; it was a private transaction between the Parks and Safeco's agent in Pocatello, Idaho. Neither Jones nor Safeco ever specified any *applicable federal* law or regulation that justified his lowball appraisal that downgraded the quality of this custom home, substantially shorted the Parks on their true square footage, and justified the use of two-year old cost data. **CR 776-801; Safeco Depo.**

It may well be that, *in-house*, or in some quarters — *not* here applicable — there are customs or practices that touch upon the periphery of some federal regulation, possibly such as preparing an appraisal for a federal institution or federally-chartered lender. But, again, that was not *this* transaction.

Misrepresentation of Appraisal for a Mortgage Refinance

Appraiser Jones did, however, represent that his appraisal was for a mortgage *lending* purpose when it was not.[19] That typed-in misrepresentation is found in the "Additional Comments" section on the top part of page 5 of the Jones appraisal:

The intended users are Safeco Insurance Co. and property

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[18] This erroneous and unsubstantiated "strictly regulated by federal guidelines" contention was also argued by Safeco to the District Court. **CR 843, line 7.**

[19] There was no mortgage on the Parks' home. **CR 228, David Parks Depo. 94:11-15.**

> owner. The intended use of this appraisal is [to] evaluate the subject of the appraisal for *a mortgage refinance transaction.* — **CR. 1020, ¶ 7 (2-9-15).**

REPLY POINT EIGHT

THE PARKS SHOULD BE PERMITTED TO AMEND TO PRESENT THEIR CLAIM FOR PUNITIVE DAMAGES TO A JURY

Safeco argues that, as a matter of law, the Parks are not entitled to amend and present their claim for punitive damages to a jury. **Safeco brief, p. 21.**

While a breach of the insuring agreement is a requirement of a claim of bad faith or for punitive damages, that was shown below and has been shown herein.

***Weinstein v. Prudential Property and Casualty Insurance*, 149 Idaho 299, 315, 233 P.3d 1221, 1237 (2010).**

The "bottom line" is that a seasoned, respected insurance professional has carefully reviewed the conduct of Safeco and provided a detailed, 21-page *Declaration* setting forth his credentials and experience in 41 paragraphs and the detailed *factual* basis for why Safeco's conduct was outrageous. The bottom line was:

> 42. For the reasons stated herein, it is my opinion, on an overall basis, that the Parks claim regarding for the total fire loss of their home on June 28, 2012 was from the outset, and on a continuing basis has been, seriously mishandled and that **the conduct of the Defendant Safeco constitutes outrageous and extreme deviations from reasonable standards of conduct** that Safeco owed its insured, the Parks. It is my further opinion that this conduct has **evidenced an indifference to the impact upon the Parks** as Safeco insureds and was with **a conscious disregard for the likely consequences upon them**.

> 43. It is my further opinion that the wrongful and indifferent claims handling conduct of Defendant Safeco towards the Parks as insureds of Safeco was **an extreme breach of the covenant of good faith and fair dealing and constituted bad faith**.
> **— CR 957, Declaration of Charles M. Miller, ¶¶ 42-43 (9-17-14)**

The Parks are entitled to present that evidence to a jury.

REPLY POINT NINE

THE PARKS ARE ENTITLED TO ATTORNEY FEES PURSUANT TO IDAHO CODE §41-1839(1); SAFECO IS NOT ENTITLED TO ATTORNEY FEES

The Parks request this Court's award of attorney fees on appeal pursuant to *Idaho Code* § 41-1839(1), on the basis that Safeco has not paid the amount justly due. It is beyond dispute that Safeco failed to honor all the policy provisions entitling the Parks to their "direct financial loss" and acted wrongfully in withholding payment and requiring the Parks to borrow money to pay their own loss before getting paid.

It was wrongful for Safeco to contend the Parks were not entitled to payment "shortly following the loss" and forcing them into a smaller home for which they had to borrow money because Safeco was not honoring its *insuring* obligation.

Safeco's conduct was contrary to the policy and outrageous; it essentially emasculated the meaning of "insurance" and receiving payment "shortly following the loss" for the Parks' home's insured value.

Safeco's assertion of attorney fees on appeal claiming this case was "brought, pursued or defended frivolously, unreasonably or without foundation" it itself

frivolous and "without foundation." It is unjustifiable to tell this Court in Safeco's briefing that the Parks "Direct financial loss" and right to payment "shortly following the loss" were not raised before the District Court when they were asserted pre-suit, brief, and orally argued.

CONCLUSION

Safeco did not honor its contractual fiduciary duties to the Parks. Its responsive brief on this appeal does *not* dispute that the District Court had the duty, in applying the policy provisions, to consider *all* policy provisions. The District Court did not do that. Safeco's responsive brief's failing to make any *substantive* response to the Parks' contract right to (1) recover their "Direct financial loss" and (2) to be paid "shortly following the loss" shows the lack of merit in Safeco's position below and now.

Safeco's brief says "The contract speaks for itself." **Safeco Brief, p. 21.** The Parks agree. It was error for the District Court to not follow the "Direct financial loss" provisions of the policy. It was inexcusably and grossly wrongful for Safeco to refuse payment "shortly following the loss" and to withhold payment forcing the Parks to borrow money for the very loss against which they bought the Safeco policy.

Safeco's brief contention that these issues were not raised below has been shown herein to be totally without merit. Groundless. Why would Safeco so contend before this Court when the Deposition Exhibits, summary judgment filings, and oral argument transcripts clearly show otherwise?

This case should be reversed directing the District Court to enter judgment in favor of the Parks for their "Direct financial loss" as shown by the stipulated-as-accurate replacement cost of the Belfor Property Restoration itemization. The remand should also entitle the Parks to amend and present their punitive damages claim to a jury.

In the alternative, at a minimum, this case should be remanded to allow the jury to hear the evidence of what the Parks "Direct financial loss" was and to present to the jury its evidence of the outrageous conduct of Safeco. Decades of premiums paid to Safeco for a "Replacement Cost" homeowners insurance policy must stand for something more than being forced to borrow money to "pay your own loss" and only having the right to sue your insurer.

"*Thank you for trusting Safeco* with your home insurance needs."

CR 305; David Parks Depo. Ex. 2, POL 49. Hollow words.

RESPECTFULLY SUBMITTED this 31st day of January, 2016

LOWELL N. HAWKES

EXTRACT OF THE PARKS' NOVEMBER 22, 2013 ANSWER TO SAFECO'S INTERROGATORY NO. 6

* * *

SHOWING ASSERTION OF THE PARKS' RIGHT TO RECOVER "THEIR DIRECT FINANCIAL LOSS" UNDER THEIR SAFECO POLICY

* * *

Referenced in the Parks' Reply Brief, p. 11

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IN THE SIXTH JUDICIAL DISTRICT COURT
BANNOCK COUNTY, IDAHO
The Honorable Stephen S. Dunn

DAVID & KRISTINA PARKS, *Plaintiffs*, vs. SAFECO INSURANCE COMPANY OF ILLINOIS, *Defendant.*	Case No. CV-2013-2253-OC **PLAINTIFFS' RESPONSE TO DEFENDANT'S FIRST DISCOVERY**

INTERROGATORIES

INTERROGATORY NO. 1: Please state your full name, and any other names or aliases you have used, your [redacted] and all [redacted] security numbers you have had.

ANSWER TO INTERROGATORY NO. 1: Plaintiff David Parks was [redacted]; Plaintiff Kristina Parks was [redacted]. Neither have used aliases. They will provide [redacted] Security numbers if a legitimate reason can be furnished for why such would be needed for this contract dispute.

INTERROGATORY NO. 2: Please state the name, address and telephone

to any of the issues involved in this action.

ANSWER TO INTERROGATORY NO. 5: The *statements* of Defendant Safeco would be reflected in documents originating with Safeco. In addition, Defendant's agent, Lucy Abendschein, advised Plaintiffs' counsel in a telephone conversation that Safeco would pay the addition money representing the difference between what has been paid for their home and their full policy limits if the Plaintiff's would build onto their current house in Idaho Falls even though Plaintiffs do not desire to do that.

INTERROGATORY NO. 6: Please set forth in detail a full and complete itemization of all damages alleged and sought by you in this action.

ANSWER TO INTERROGATORY NO. 6: Plaintiffs seek their "Direct Financial Loss" as set forth in the Safeco policy. That amount is the difference between what Safeco has paid for their home and the $409,090 of coverage, being less than the $440,195.55 determined by Belfor Property Restoration as the Plaintiffs' loss that Safeco agreed to be bound by as the cost to replace the Plaintiffs' home — the "Direct Financial Loss" and "actual cash value" of the total structure/dwelling loss. In addition the Plaintiffs seek statutory 12% APR interest pursuant to *Idaho Code* §28-22-104 on that difference, the interest that Plaintiffs are being required to pay on their Idaho Falls new home loan, costs incurred in this litigation, and attorney fees pursuant to *Idaho Code* §41-1839.

INTERROGATORY NO. 7: For each and all of the damages alleged above in your Answer to Interrogatory No. 6, please set forth the facts supporting your claim to

REQUEST NO. 32: Any and all documents or things related to or pertaining to your Answer to Interrogatory No. 26, or relied upon you in preparing your Answer to Interrogatory No. 26.

RESPONSE TO REQUEST NO. 32: This is the policy Declarations information that Defendant Safeco furnished.

REQUEST NO. 33: Any and all documents or things you relied upon in preparing your Answer to Interrogatory No. 27, or which were identified therein.

RESPONSE TO REQUEST NO. 33: There are none except as came from Defendant with the discovery requests.

DATED this 22nd day of November, 2013

LOWELL N. HAWKES, CHARTERED

LOWELL N. HAWKES

VERIFICATION

As counsel for the Plaintiffs herein, and being more fully informed on a total basis as to the subject matter and contentions of this discovery, I verify that the foregoing are true and correct based on the information currently known and available.

LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2013 I mailed a copy of the foregoing to Robert A. Anderson of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, ID 83707-7426; FAX 208-344-5510.

LOWELL N. HAWKES

* * * Communication Result Report (Nov. 22. 2013 5:17PM) * * *

1) Lowell N. Hawkes, CHTD
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Date/Time: Nov. 22. 2013 5:00PM

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The Honorable Stephen S. Dunn

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INTERROGATORIES

INTERROGATORY NO. 1: Please state your full name, and any other names or aliases you have used, your [redacted] and all social security numbers you have had.

ANSWER TO INTERROGATORY NO. 1: Plaintiff David Parks was born [redacted]; Plaintiff Kristina Parks was [redacted] Neither have used aliases. They will provide Social Security numbers if a legitimate reason can be furnished for why such would be needed for this contract dispute.

INTERROGATORY NO. 2: Please state the name, address and telephone

EXTRACT OF THE PARKS' SEPTEMBER 3, 2013 RESPONSE TO SAFECO'S REQUEST FOR ADMISSION NO. 21

* * *

SHOWING ASSERTION OF THE PARKS' RIGHT TO RECOVER "THEIR DIRECT FINANCIAL LOSS" UNDER THEIR SAFECO POLICY

* * *

Referenced in the Parks' Reply Brief, p. 11

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DAVID & KRISTINA PARKS, *Plaintiffs,* vs. SAFECO INSURANCE COMPANY OF ILLINOIS, *Defendant.*	Case No. CV-2013-2253-OC **PLAINTIFFS' RESPONSE TO DEFENDANT'S FIRST REQUESTS FOR ADMISSION**

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that Exhibit A, attached hereto, is a true and correct copy of the July 21, 2012, Appraisal Report prepared by Robert K. Jones.

RESPONSE TO RFA NO. 1: Denied. No Exhibit A was attached; there were no attachments to this discovery. Plaintiffs have seen an appraisal but have never seen the original so could not admit whether any copy is a true and correct copy of the original.

in Idaho Falls.

REQUEST FOR ADMISSION NO. 19: Please admit that the total consideration paid by Plaintiffs for the Idaho Falls, Idaho, house was $300,000.

RESPONSE TO RFA NO. 19: Admitted.

REQUEST FOR ADMISSION NO. 20: Please admit that the total consideration paid by Plaintiffs for the Idaho Falls, Idaho, replacement house was less than $440,195.55.

RESPONSE TO RFA NO. 20: Admitted.

REQUEST FOR ADMISSION NO. 21: Please admit that as to replacement cost, the policy (paragraph 5.a, p. 12) provides "We will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts...."

RESPONSE TO RFA NO. 21: Admitted that is a portion of the policy. Plaintiffs' claim is based on the provisions thereafter allowing recovery for their "direct financial loss" as set forth in 5 (a)(4)(b) on page 12.

REQUEST FOR ADMISSION NO. 22: Please admit that the smallest of the "following amounts" listed in the policy at paragraph 5.a, p. 12, was the $300,000 spent by the Parks to "replace the damaged building."

RESPONSE TO RFA NO. 22: Denied as not relevant to the Parks claim.

REQUEST FOR ADMISSION NO. 23: Please admit that this suit was not well grounded in fact.

RESPONSE TO RFA NO. 23: Denied.

REQUEST FOR ADMISSION NO. 24: Please admit that this suit was not warranted by existing law.

RESPONSE TO RFA NO. 24: Denied.

REQUEST FOR ADMISSION NO. 25: Please admit that this suit was not warranted by a good faith argument for the extension, modification, or reversal of existing law.

RESPONSE TO RFA NO. 25: Denied.

REQUEST FOR ADMISSION NO. 26: Please admit that Plaintiffs' suit in this matter is frivolous.

RESPONSE TO RFA NO. 26: Denied.

DATED this 3rd day of September, 2013

LOWELL N. HAWKES, CHARTERED

LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2013 I faxed a copy of the foregoing to Robert A. Anderson of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, ID 83707-7426; FAX 208-344-5510.

LOWELL N. HAWKES

* * * Communication Result Report (Sep. 3. 2013 5:13PM) * * *

1) Lowell N. Hawkes, CHTD
2)

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REQUEST FOR ADMISSION NO. 1: Please admit that Exhibit A, attached hereto, is a true and correct copy of the July 21, 2012, Appraisal Report prepared by Robert K. Jones.

RESPONSE TO RFA NO. 1: Denied. No Exhibit A was attached; there were no attachments to this discovery. Plaintiffs have seen an appraisal but have never seen the original so could not admit whether any copy is a true and correct copy of the original.

EXTRACT OF THE PARKS' OCTOBER 22, 2013 RESPONSE TO SAFECO'S REQUEST FOR ADMISSION NO. 40

* * *

SHOWING ASSERTION OF THE PARKS' RIGHT TO RECOVER "THEIR DIRECT FINANCIAL LOSS" UNDER THEIR SAFECO POLICY

* * *

Referenced in the Parks' Reply Brief, p. 11

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Attorneys for Plaintiffs

IN THE SIXTH JUDICIAL DISTRICT COURT
BANNOCK COUNTY, IDAHO
The Honorable Stephen S. Dunn

DAVID & KRISTINA PARKS, *Plaintiffs*, vs. SAFECO INSURANCE COMPANY OF ILLINOIS, *Defendant*.	Case No. CV-2013-2253-OC **PLAINTIFFS' RESPONSES TO DEFENDANT'S SECOND REQUESTS FOR ADMISSION**

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 27: Please admit that Exhibit A, attached hereto, is a true and correct copy of the July 21, 2012, Appraisal Report prepared by Robert K. Jones.

RESPONSE TO RFA NO. 27: Denied. Plaintiffs cannot admit to this document being "a true and correct copy" as the purported original has never been made available to them under authenticating circumstances.

RESPONSE TO RFA NO. 38: Plaintiffs can neither admit nor deny this Request as it is unclear what is specifically being requested and what "the estimate in Exhibit C" refers to among the 586+ items enumerated in the pages with footer numbers "Page: 3" through "Page: 29". If this Request as asking Plaintiffs to admit that the Belfor Property Restoration sets forth amounts that by their total both Plaintiffs and their insurer were willing to be bound by as the Direct Financial Loss to the Parks as computed by the estimated values set forth in the Belfor document then that is admitted.

REQUEST FOR ADMISSION NO. 39: Please admit that Plaintiffs have never contested the estimate given in Exhibit C.

RESPONSE TO RFA NO. 39: Plaintiffs can neither admit nor deny this for the reasons set forth in the Response to Request No. 38 above:

> Plaintiffs can neither admit nor deny this Request as it is unclear what is specifically being requested and what "the estimate in Exhibit C" refers to among the 586+ items enumerated in the pages with footer numbers "Page: 3" through "Page: 29". If this Request as asking Plaintiffs to admit that the Belfor Property Restoration sets forth amounts that by their total both Plaintiffs and their insurer were willing to be bound by as the Direct Financial Loss to the Parks as computed by the estimated values set forth in the Belfor document then that is admitted.

REQUEST FOR ADMISSION NO. 40: Please admit that the estimate in Exhibit C represents the amount to repair or reconstruct the dwelling.

RESPONSE TO RFA NO. 40: Denied as to "repair" as the home was nor repairable but was a total loss. Admitted that Safeco agreed the Parks' policy with

Safeco insured their home in the amount of the replacement cost as representing what the loss to the Parks was; denied if it is contended the amount they were entitled to could be reduced by Safeco to an amount less than their Direct Financial Loss as measured by the cost of replacing what they had lost as set forth in the Belfor document. See paragraphs 15 through 19 of the *Complaint And Jury Demand.*

DATED this 22nd day of October, 2013

LOWELL N. HAWKES, CHARTERED

LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2013 I faxed a copy of the foregoing to Robert A. Anderson of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, ID 83707-7426; FAX 208-344-5510.

LOWELL N. HAWKES

* * * Communication Result Report (Oct. 22. 2013 3:02PM) * * *

1) Lowell N. Hawkes, CHTD
2)

Date/Time: Oct. 22. 2013 3:00PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
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Reason for error
E. 1) Hang up or line fail
E. 2) Busy
E. 3) No answer
E. 4) No facsimile connection
E. 5) Exceeded max. E-mail size

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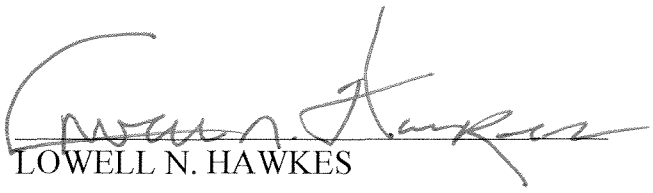
REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 27: Please admit that Exhibit A, attached hereto, is a true and correct copy of the July 21, 2012, Appraisal Report prepared by Robert K. Jones.

RESPONSE TO RFA NO. 27: Denied. Plaintiffs cannot admit to this document being "a true and correct copy" as the purported original has never been made available to them under authenticating circumstances.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2016 I mailed two copies of the foregoing to Robert A. Anderson and Mark D. Sebastian of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, ID 83707-7426; FAX 208-344-5510.



LOWELL N. HAWKES